Hong Kim Sime & Ors v Malayan Banking Bhd and other actions

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-13-1994 CONSOLIDATED WITH CIVIL APPEAL NOS S-02-14-1994 AND S-02-15-1994

LAMIN PCA, MAHADEV SHANKAR AND AHMAD FAIRUZ JJCA

10 MAY 1996

Bankruptcy *— Petition — Validity of creditor's petition — Affidavit of truth of contents affirmed before Justice of the Peace in Sabah — Whether Justice of the Peace was authorized to administer oath — Whether petition was a nullity — Bankruptcy Act 1967 s 128 — Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 reg 2*

Bankruptcy *— Petition — Validity of creditor's petition — Number assigned by registry to bankruptcy notice different from number of creditor's petition — Whether petition was a nullity — Bankruptcy Act 1967 s 131*

In this case, the respondent bank ('the bank') took out a creditor's petition against the first appellant. The branch manager of the bank affirmed the truth of the statements in the petition in Sabah before a Justice of the Peace in that state. The first appellant claimed that the petition was a nullity, on the grounds that: (i) there had been non-compliance with s 128 of the Bankruptcy Act 1967 ('the Act') as the Justice of the Peace was not authorized to administer the oath; and (ii) there had been a non-compliance with r 9 of the Bankruptcy Rules 1969 ('the Rules') as the number assigned by the registry to the bankruptcy notice was different from the number found in the creditor's petition. The High Court judge dismissed the objection. The first appellant appealed.

Held, dismissing the appeal:

(1) The effect of reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 is that in Sabah, every Justice of the Peace: 'shall be authorised and is required to administer oaths under *any written law* ... as though he were a Second Class Magistrate'. 'Any written law' must include the Act (see pp 451I and 452A).

(2) The use of a different number was purely a formal defect and s 131 of the Act clearly provides that it should not invalidate the proceedings (see p 452A).

[Bahasa Malaysia summary

Dalam kes ini, penentang iaitu sebuah bank ('bank tersebut') telah mengambil suatu petisyen pemiutang terhadap perayu pertama. Pengurus cawangan bank tersebut telah mengesahkan kebenaran pernyataan-pernyataan dalam petisyen di Sabah di hadapan seorang Jaksa Pendamai di negeri itu. Perayu pertama mendakwa bahawa

petisyen itu adalah suatu pembatalan, atas alasan bahawa: (i) terdapatnya ketidakpatuhan s 128 Akta Kebankrapan 1967 ('Akta tersebut') oleh kerana Jaksa Pendamai tidak diberikuasa untuk mentadbirkan sumpah itu; dan (ii) terdapatnya ketidakpatuhan dengan k 9 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah tersebut') oleh kerana nombor yang diberikan kepada notis kebankrapan oleh pejabat pendaftaran berbeza daripada nombor yang didapati dalam petisyen pemiutang. Hakim Mahkamah Tinggi telah menolak bantahan. Perayu pertama membuat rayuan.

Diputuskan, menolak rayuan:

(1) Kesan peraturan 2 Peraturan-Peraturan Mahkamah Rendah (Kuasa-Kuasa Jaksa Pendamai) (Sabah) 1990 adalah bahawa di negeri Sabah, setiap Jaksa Pendamai: 'akan diberikuasa dan adalah dikehendaki mentadbirkan sumpah di bawah *mana-mana undang-undang bertulis* ... seolah-olah beliau seorang Majistret Kelas Kedua'. 'Mana-mana undang-undang bertulis' haruslah termasuk Akta tersebut (lihat ms 451I dan 452A).

(2) Penggunaan nombor yang berbeza hanya merupakan suatu kecacatan rasmi dan s 131 Akta tersebut jelas memperuntukkan bahawa ia tidak harus mentaksahkan prosiding (lihat ms 452A).]

Notes

For cases on creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1297–1302.

Legislation referred to

Bankruptcy Act 1967 ss 128, 131
Bankruptcy Rules 1969 r 9
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations reg 2

Appeal from: Bankruptcy Petition Nos T(29) 140 of 1993, T(29) 149 of 1993 and T(29) 148 of 1993 (High Court, Tawau)

PK Lim (*PK Lim & Co*) for the appellants.
Lucy Ho (*Hiew & Chin*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): On 17 March 1988, Malayan Banking Bhd ('the bank') obtained judgment in the High Court at Tawau Civil Suit No T298 of 1986 against Hong Kim Sime ('Hong'), Goh Bun Kwee ('Goh') and Yee Pak Kui ('Yee') for RM265,887,41 interest thereon and costs ('the judgment debt').

The judgment debtors did not do anything to satisfy the judgment debt. The bank therefore resorted to bankruptcy proceedings individually against each of the judgment debtors.

A On 1 March 1993, the bank issued a bankruptcy notice against Hong Kim Sime. It was registered as T(29) 39 of 1993, and personally served on Hong on 3 May 1993. He failed to comply and thereby committed an act of bankruptcy on 11 May 1993.

On 23 November 1993, the bank took out a creditor's petition. It B was registered as T(29) 140 of 1993. The branch manager of the bank affirmed the truth of the statements in the petition in Tawau, Sabah before Mr Chai Tat Min, who is a Justice of the Peace in Sabah. After the petition was served, Hong filed a notice to oppose the petition. He claimed that the petition was a nullity on two grounds:

C (1) that the Justice of the Peace was not authorized to administer the oath and there had been non-compliance with s 128 of the Bankruptcy Act 1967;

(2) that there had been a non-compliance with r 9 of the Bankruptcy Rules 1969 in that the number assigned by the registry to the D bankruptcy notice had not been assigned to the creditor's petition which was given a different number.

The bank had simultaneously issued individual bankruptcy notices against Goh and Yee for the judgment debt. Apart from minor differences as to the respective dates of service of the notice and petition, the content and E manner of affirmation of the documents were substantially the same. The same objections were taken by Goh and Yee, and all three were heard together by Ian Chin J who gave a written judgment in open court on 11 July 1994 dismissing the objection.

Hong, Goh and Yee each filed a notice of appeal on 15 July 1994, F followed by a memorandum of appeal on 24 August 1994.

Meanwhile, the bank proceeded with the creditor's petition in the High Court. Before it was heard Hong, Goh and Yee on 15 August 1994 came to an agreement with the bank that they would settle the judgment debt by 15 December 1994 on condition that the bank did not proceed G with the creditor's petitions against each of them. The bank accordingly submitted to the petitions being struck out by the High Court on 3 October 1993. After paying RM150,000 towards the judgment debt, the judgment debtors failed to settle the balance by 15 December 1994.

In the face of these arrangements, the judgment debtors proceeded H with these appeals. On 19 December 1995, we dismissed them with costs and directed the deposit made to be paid out to the bank towards its costs.

Ian Chin J has in his usual and erudite way covered the ground. We agree with what he has said.

The effect of reg 2 of the Subordinate Courts (Powers of Justices of I the Peace) (Sabah) Regulations 1990 is that in Sabah, every Justice of the Peace:

> shall be authorised and is required to administer oaths under any written law ... as though he were a Second Class Magistrate.

'Any written law' must, in our view, include the Bankruptcy Act 1967. The use of a different number was purely a formal defect and s 131 of the Bankruptcy Act 1967 clearly provides that it should not invalidate the proceedings.

We need to add that these appeals were misconceived since the creditor's petitions had already been struck out in the court below in compliance with a condition imposed by these appellants.

We directed that the same order be made in Hong's appeal should also follow in the appeals of Goh and Yee and this judgment applies to all three appeals equally.

Order accordingly.

Reported by Isabel Liong